

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-4623-00
JJSweeney

date:

to: Chief Examination Division, Manhattan District
Attn: Laura Hargrove, Employment Tax Specialist, Group 1352

from: District Counsel, Manhattan

subject: Taxpayer: [REDACTED] (U.I.L. #6501.08-10)
EIN: [REDACTED]
Taxable Years: [REDACTED] and [REDACTED] (Forms 940 and 941)

PROPER PARTY TO SIGN FORM SS-10 AFTER MERGER

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This memorandum responds to your request of August 1, 2000 for written advice concerning the appropriate language for a Form SS-10, Consent to Extend the Time to Assess Employment Taxes, in connection with the federal employment tax returns of [REDACTED] for its [REDACTED] and [REDACTED] years. This request was made in light of the purported merger under [REDACTED] law of [REDACTED] and [REDACTED].

In brief, we conclude the Form SS-10 to be issued should be captioned as follows: "[REDACTED] ([REDACTED]), formerly known as [REDACTED] ([REDACTED])". The Form SS-10 should be executed by a principal officer of [REDACTED]. These conclusions are subject to our other recommendations made herein, which should be read in full before preparing the Form SS-10.

Facts

██████████ ("██████") filed a Form 1120F, Federal Income Tax Return of a Foreign Corporation, for each of the ██████ through ██████ taxable years (among other years). ██████ was a foreign banking organization registered as a limited company in ██████████. It operated a portion of its banking functions for those years through branches situated in the United States. Being a foreign corporation, ██████ was not part of a consolidated return group for these years.

On ██████████, ██████ and ██████, also a banking organization registered as a limited company in ██████████, purportedly executed a Merger Agreement under the laws of ██████████¹. This merger culminated from several transactions in which ██████ acquired all of the common stock of ██████. In this merger, ██████ emerged as the surviving corporation; the separate existence of ██████ ceased. All of the assets of ██████, including those located outside of ██████, became vested in ██████. ██████ assumed all of ██████'s outstanding liabilities, including those liabilities incurred by ██████ outside of ██████ and dividends to ██████'s stockholders to be paid for the ██████████ year. Also upon the merger, ██████ adopted the name "██████████". In connection with this name change, ██████████ has represented to you that its EIN for U.S. tax purposes is the same EIN as for ██████.

The Examination Division is currently examining several of ██████'s tax returns for taxable years preceding the merger. In connection with these examinations, the Examination Division seeks to extend the period on assessment for ██████'s federal employment tax returns filed for its ██████ and ██████ tax years. These returns consist of ██████'s Employer's Quarterly Federal Tax Returns ("Form 941") and Employer's Annual Federal Unemployment (FUTA) Tax Returns ("Form 940") for ██████ and ██████. You have indicated that the three-year periods for assessment of taxes reportable on the Form 940 and Form 941 for ██████ currently remain open for assessment. I.R.C. § 6501(a) and § 6501(b)(2). You further indicated that the periods for assessment of taxes reportable on the Form 940 and Form 941 for ██████ remains open based on SS-10s that were executed before the three-year period

¹ We reviewed an unexecuted version of this merger agreement. For purposes of this memorandum, we assume that this agreement was executed on ██████████, the date identified thereon. See our recommendation (supra) in connection with ██████'s failure to provide an executed version of this agreement.

for assessment expired for those returns. I.R.C. § 6501(c)(4).

The issue is whether [REDACTED] is the proper party to execute a Form SS-10 to extend the period for assessing the employment taxes reportable on the Forms 940 and 941 for the [REDACTED] and [REDACTED] years. If so, it must then be determined how [REDACTED] should be described on the "name" line of the Form SS-10. It must be further determined which employee or other representative of [REDACTED] may sign the Form SS-10.

Law and Analysis

As you indicate that the Forms 940 and Forms 941 covering [REDACTED]'s [REDACTED] and [REDACTED] tax years currently remain open for assessment, a Form SS-10 can be secured to extend (or further extend for the Form 940 and Form 941 for [REDACTED]) the statute of limitations on assessment for those returns². I.R.C. § 6501(c)(4)(A). For this purpose, [REDACTED] is the proper party to execute the Form SS-10 if it bears primary liability for the debts of [REDACTED]. [REDACTED] was the surviving corporation in the merger with [REDACTED]. It changed its name to [REDACTED] upon the merger. Thus, with respect to [REDACTED], the language for a Form SS-10 should be treated as a situation in which a corporation has undertaken a mere change in name. Gator Oil Company v. Commissioner, 66 T.C. 145 (1976).

In Gator Oil, the petitioner changed its name by amending its by-laws and by filing its name change with Florida, its state of incorporation. The Court determined that under Florida law this name change had no effect on the petitioner's continuing liability for debts incurred before its change in name. When an entity changes its name, relevant local law should determine the extent to which the name change has any impact on the entity's liability for debts incurred before its change in name.

In this case, the merger agreement specified that [REDACTED] was to assume all of the liabilities of [REDACTED]. It is reasonable to conclude that under the agreement [REDACTED] continued to bear its own obligations even after its change in name, and that [REDACTED] law would so require.

²You further specified that the period for assessment for the Forms 940 for [REDACTED] and [REDACTED] currently expires on [REDACTED] and that the period for assessment for the Forms 941 for [REDACTED] and [REDACTED] expires on [REDACTED] and [REDACTED], respectively. The SS-10 executed based on the above language should be executed before these respective expiration dates for assessment.

Accordingly, [REDACTED] is the party to execute the Form SS-10, with the following caption: "[REDACTED] ([REDACTED]), formerly known as [REDACTED] ([REDACTED])".

A principal officer of [REDACTED] should sign the Form SS-10. In this connection, neither I.R.C. § 6501 nor its regulations specify who may execute a consent form for a corporation. The IRS generally applies the rules for the execution of original returns to determine who may execute a consent to extend the period of limitation on assessment. Rev. Rul. 83-41, 1983-1 C.B. 349. With respect to employment tax returns filed by corporations, a corporation's president, vice-president, or other principal officer may sign these returns. Treas. Reg. § 31.6061-1. It follows, therefore, that a principal officer of [REDACTED] may execute the SS-10 for [REDACTED].

Please note that our above analysis is based on an unexecuted copy of the purported merger agreement. We therefore recommend that you verify that the merger was consummated upon these same terms. For this purpose, you might request an executed copy of the agreement or other documentation to ensure that the merger was consummated and that [REDACTED] assumed the liabilities of [REDACTED] and [REDACTED].

We further recommend that you verify the EIN of [REDACTED], if you have not done so previously. If any EIN change has occurred, such EIN should replace the EIN for [REDACTED] identified in our above-recommended language for the Form SS-10.

Furthermore, Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form 872. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document these actions in the case file.

Finally, we recommend that you pay strict attention to the IRM's procedures for securing and processing a Form SS-10. The Employment Tax Handbook, Handbook 104.6, states, among other things, that, if appropriate, Letter 907(DO) may be used to solicit a Form SS-10. The Form SS-10 should be completed in triplicate, and the taxpayer should be requested to sign and return all three originals. The person delegated by the Service to execute the consents should do so (generally the group

manager-see Delegation Order No. 42, as revised). One original of the SS-10 should be returned to the taxpayer, one original should be retained in the case file, and one original should be retained in the group's control files. The group manager should update statute controls and AIMS by completing Form 5348 (Examination Update) and should properly annotate Form 895. If the Form SS-10 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement. Please read Handbook 104.6 for a complete description of these procedures.

If you have any questions concerning the advice provided in this memorandum, please contact John Sweeney at (212) 264-1595, ext. 263. We will retain our files for this case to provide further assistance.

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